

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 9291 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE K.G.BALAKRISHNAN
and

MR.JUSTICE J.M.PANCHAL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes

2. To be referred to the Reporter or not? No

3. Whether Their Lordships wish to see the fair copy of the judgement? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to the Civil Judge? No

PATAN MUNICIPALITY

Versus

STATE OF GUJARAT

Appearance:

MR NV ANJARIA for Petitioner
MR U.A.TRIVEDI, A.G.P. for Respondents No. 1, 2 & 3
MR PK JANI for Respondents No. 4 to 8
MR RC JANI for Respondent No. 9

CORAM : MR.JUSTICE K.G.BALAKRISHNAN and

MR.JUSTICE J.M.PANCHAL

Date of decision: 25/03/98

ORAL JUDGEMENT

(Per : Panchal,J.) :-

In this petition, which is filed under Article

226 of the Constitution, the petitioner has prayed to issue a writ of mandamus or any other appropriate writ, order or direction to quash and set aside orders dated June 9, 1997 and August 29, 1997 as well as communication dated December 19, 1997 by which respondent no.1 i.e. State Government has decided to withdraw from acquisition of Survey no. 1038 situated at Gungadi Pati, Patan, District : Mehsana, which is acquired for setting-up a Pumping Station.

2. The land bearing survey no.1038, which admeasures 384 sq.mts. and which is situated at Gungadi Pati, Patan, originally belonged to Smt. Chandravati Sevantilal Shah, Jaykumar Sevantilal, Rajanikant Sevantilal, Subhadraben Rasiklal, Rameshchandra Rasiklal and Niranjan Rasiklal. The petitioner i.e. Patan Municipality felt need to construct a pumping station in view of introduction of underground drainage system in Patan City. Therefore, a proposal was made by the petitioner to Executive Engineer, Public Health & Works Department of Gujarat Water Supply and Sewerage Board to acquire 384 sq.mts. of land out of survey no.1038 for setting-up a pumping station. The Executive Engineer, Public Health & Works Department examined the matter and in turn proposed to the Collector, Mehsana to initiate steps for acquiring said land to enable the petitioner-Municipality to set-up a pumping station. On receipt of necessary report from the competent authorities, it appeared to the State Government that land admeasuring 384 sq.mts. of survey no.1038 situated at Gungadi Pati, Patan was likely to be needed for a public purpose, viz. setting-up a pumping station and, therefore, preliminary notification dated July 30, 1981 under section 4 of the Land Acquisition Act, 1894 ("Act" for short) was published in Official Government Gazette on September 16, 1981. Thereafter, notices were served on the interested parties, who filed their objections against the proposed acquisition. The Special Land Acquisition Officer considered the objections submitted by the interested persons and forwarded his report as contemplated by sub-section (2) of Section 5-A of the Act. After considering the report submitted under section 5-A(2) of the Act, the Government decided to acquire 384 sq.mts. of land out of survey no.1038 situated at Gungadi Pati, Patan for setting-up a pumping station by the petitioner-Municipality. Therefore, declaration under section 6 of the Act was made on August 6, 1983 which was published in the Official Government Gazette on October 30, 1983. The Special Land Acquisition Officer thereafter issued notices to the interested persons under section 9 of the Act and

published an award granting compensation to the interested persons on September 24, 1984. A copy of award passed by the Special Land Acquisition Officer is produced by the petitioner at Annexure-A to the petition. As indicated in Para-3 of the petition, because of various reasons possession of the land could not be taken, though the award was rendered by the Special Land Acquisition Officer on September 24, 1984. Near the land which is acquired, there is one building known as 'Ashok Complex'. The promoters of Ashok Complex, i.e. Ashokkumar Popatlal Shah and Amaritkumar Tarachand had filed Special Civil Application no. 7170/95 in the High Court to restrain the petitioner- Municipality from constructing the pumping station on survey no.1038 on the ground that the land acquired was surrounded by residential units and construction of a pumping station was likely to cause health hazards to the residents of the area. On notice being issued, the petition was contested by the petitioner-Municipality and an affidavit-in-reply was filed in the said petition. The petitioner has produced a copy of the affidavit-in-reply filed in Special Civil Application no. 7170/95 at Annexure-B to the petition. From the averments made in para-4 of the petition, it is evident that during the course of hearing of the said petition, a direction was issued by the High Court to Gujarat Pollution Control Board to submit a report, as grievance was made in the petition that construction of pumping station was likely to cause health hazards to the residents. Pursuant to the direction given by the Court in the said petition, inspection of the site by the team of officials of Gujarat Pollution Control Board as well as Gujarat Water Supply and Sewerage Board was carried out and necessary report in the form of an affidavit was submitted before the Court. The report submitted in the form of affidavit by Gujarat Pollution Control Board is produced by the petitioner at Annexure-C to the petition. In the report, it was indicated by Gujarat Pollution Control Board that there would be no exposure of sewage to the atmosphere near the pumping station, nor would be there any chance of mosquito breeding and setting-up of a pumping station was not likely to cause any health hazards to the residents. In view of the contents of the report of Gujarat Pollution Control Board, petition filed by the promoters of Ashok Complex was dismissed by the Court vide judgment and order dated October 15, 1996, which is produced by the petitioner at Annexure-D to the petition. After dismissal of Special Civil Application no.7170/95, the competent authority had called upon the owners of survey no.1038 to hand over possession of the land. However, the competent authority was impeded in taking

possession under the Act and, therefore, possession of the land was taken by Executive Magistrate in presence of two respectable citizens of Patan City on January 2, 1997 under a panchnama as per provisions of Section 47-A of the Act. The panchnama drawn is produced by the petitioner at Annexure-E collectively to the petition. The Mamlatdar, Patan thereafter handed over possession of the land in question to the petitioner-Municipality on January 2, 1997 and the Chief Officer of the petitioner-Municipality had executed Possession Receipt in favour of Mamlatdar indicating that the Chief Officer of the petitioner-Municipality had taken possession of the land on behalf of the petitionerMunicipality. The Possession Receipt executed by the Chief Officer of the petitioner-Municipality is also produced at Annexure-E collectively to the petition. After taking possession of the land, the petitionerMunicipality handed over possession of the land to the Deputy Executive Engineer, Gujarat Water Supply & Sewerage Board, through whose agency the pumping station was to be constructed. This is evident from Annexure-F to the petition, which is executed by the Deputy Executive Engineer, Gujarat Water Supply & Sewerage Board. In the meantime, the original owners of the land transferred the land to respondent no.9 by executing a sale deed. Respondent no.9 after purchase of the land, made a request to the State Government to withdraw from acquisition of survey no.1038 by making a representation dated January 4, 1997. No action on the representation submitted by respondent no.9 was taken by the State Government. Therefore, respondent no.9 instituted Special Civil Application no. 164/97 in the High Court for quashing and setting aside acquisition proceedings. The Court by an order dated January 17, 1997 directed the State Government to consider the representation within the time stipulated therein and with that direction, the petition was disposed of. A copy of order passed by the Court in Special Civil Application no. 164/97 is produced by the petitioner at Annexure-G to the petition. In view of the direction given by the Court in Special Civil Application no.164/97, the representatioin made by respondent no.9 was considered by the State Government and the State Government has decided to withdraw from acquisition of survey no.1038 situated at Gungadi Pati, Patan, which is evident from orders dated June 9, 1997 as well as August 29, 1997 and communication dated December 19, 1997, which are collectively produced at Annexure-L to the petition. The decision of the State Government to withdraw from acquisition of survey no.1038 has given rise to present petition.

3. Mr. N.V.Anjaria, learned Counsel for the petitioner submitted that possession of the land was taken by the competent authority on January 2, 1997 and thereafter possession was handed over to the petitioner-Municipality on that very day and, therefore, as the State Government lacks powers to withdraw from acquisition of survey no.1038, which is quite evident from the provisions of section 48 of the Act, the petition should be allowed. It was pleaded that once the possession of the land has been taken, the land vests in the State Government absolutely free from all encumbrances and, therefore, as the Government has no authority to withdraw from the acquisition of land in question, prayer made in the petition should be granted. In support of his submission, learned Counsel placed reliance on the decisions rendered in (1) Lt. Governor of Himachal Pradesh and another vs. Sri Avinash Sharma, AIR 1970 SC 1576, (2) Special Land Acquisition Officer, Bombay and others vs. M/s. Godrej & Boyce, AIR 1987 SC 2421, (3) Menka Co-operative Housing Society Limited and another vs. State of Gujarat and others, 1994(1) GLH, 478, (4) Awadh Bihari Yadav and others vs. State of Bihar and others, AIR 1996 SC 122, and (5) Mohan Singh and others vs. International Airport Authority of India and others, (1997)9 SCC 132.

4. Mr. U.A.Trivedi, learned Assistant Government Pleader appearing for respondents no.1 to 3 submitted that earlier in the year 1992, a proposal was made by the petitioner-Municipality to the State Government to withdraw from acquisition of survey no.1038 situated in Patan Town and, therefore, the petition should be dismissed. It was stressed by the learned A.G.P. that in view of the objections lodged by the persons residing near survey no.1038, State Government has decided to withdraw from acquisition of survey no.1038 and as State Government is ready and willing to allot another land to the petitioner-Municipality for setting-up a pumping station, the prayers made in the petition should not be granted. What was claimed on behalf of respondents no.1 to 3 was that a just decision has been taken by the respondents- State and, therefore, Court should not interfere with the same in the present petition.

5. Mr. R.C.Jani, learned Counsel appearing for respondent no.9 submitted that survey no.1038 situated in Gungadi Pati,Patan is not suitable for constructing a pumping station and as plot no.150 of City Survey no.1769 is available to the petitioner-Municipality for constructing pumping station, the petition should be dismissed, more particularly when the State Government

after mature consideration, has decided to withdraw from acquisition of survey no.1038, situated in Patan City.

6. Mr. P.K.Jani, learned Counsel appearing for respondents no.4 to 8 has supported the petitioner and pleaded that in view of the averments made in the petition, the petition should be allowed, as the State Government has no authority to withdraw from acquisition of survey no.1038 after its possession was handed over to the petitioner-Municipality.

7. Though all the respondents are duly served, no reply affidavit is filed by any of the respondents controverting the averments made in the petition.

8. In view of the rival submissions advanced at the Bar, the question which falls for consideration of the Court is, whether the decision of the State Government to withdraw from the acquisition of survey no.1038 situated at Gungadi pati, Patan, is legal or not ? From the facts which have been noticed earlier, it is evident that possession of the land was taken by the Executive Magistrate in presence of two respectable residents of Patan City on January 2, 1997 as contemplated by the provisions of section 47-A of the Act. The possession receipt executed by the Chief Officer of petitionerMunicipality unerringly shows that Mamlatdar had thereafter handed over possession of the land in question to the Chief Officer of the petitioner-Municipality. The record further indicates that Patan Municipality has handed over possession of the land to Deputy Executive Engineer, Gujarat Water Supply & Sewerage Board, through whose agency construction of pumping station is to be carried out. Thus, the record unmistakably shows that possession of the land was taken by the Government and is handed over to the petitionerMunicipality. The scheme of the Act would show that once possession of the land sought to be acquired is taken by the State Government after declaration under section 6 of the Act is made and once the award is passed by the Special Land Acquisition Officer as contemplated by section 11 of the Act, the land vests in the State Government free from all encumbrances. It is well settled that once acquisition proceeding is complete and land vests in the State Government from from all encumbrances, the proceeding becomes final and the Government cannot divest itself of the title to the land. Section 48 of the Act provides as to in which circumstances Government can withdraw from the acquisition of any land and reads as under :-

"48. Completion of acquisition not compulsory, but compensation to be awarded when not completed- (1) Except in the case provided for in Section 36, the Government shall be at liberty to withdraw from the acquisition of any land of which possession has not been taken.

(2) Whenever the Government withdraws from any such acquisition, the Collector shall determine the amount of compensation due for the damage suffered by the owner in consequences of the notice or of any proceedings thereunder, and shall pay such amount to the person interested, together, with all costs reasonably incurred under this Act relating to the said land.

(3) The provisions of Part-III of this Act shall apply, so far as may be, to the determination of compensation payable under this section."

9. A bare reading of sub-section (1) of Section 48 makes it abundantly clear that the Government is at liberty to withdraw from the acquisition of any land of which possession has not been taken. Once possession has been taken, State Government cannot exercise its power to withdraw from the acquisition of land. The powers conferred under section 48 are available till the time possession of the land under acquisition has not been taken, but, once possession is taken, the Government cannot decide to withdraw from the acquisition of the land concerned. In the case of Lt. Governor of Himachal Pradesh and another (supra), notification under section 17(1) of the Act was published by the State Government. Thereafter possession of the land which was subject matter of notification issued under section 17(1) of the Act, was taken and the land had vested in the Government. The notification under section 17(1) of the Act was sought to be cancelled by the Government by exercising powers under section 21 of the General Clauses Act. While examining the validity of action of the State Government, Supreme Court has held that after possession has been taken pursuant to a notification under section 17(1), the land is vested in the Government and the Government cannot cancel notification under section 21 of the General Clauses Act nor can notification be withdrawn in exercise of powers under section 48 of the Land Acquisition Act. The Supreme Court has noted that when possession of the land is taken under section 17(1), the land vests in the Government and there is no provision by which land statutorily vested in the Government, reverts to the original owner by mere cancellation of notification. The Supreme Court has examined the scheme

of the Act in the case of the Special Land Acquisition Officer, Bombay and others (supra). After examining the scheme, the Apex Court has ruled that so long as the possession is not taken over, the mere fact of a notification under section 4 or declaration under section 6 having been made does not divest the owner of his rights in respect of the land or relieve him of the duty to take care of the land and protect it against encroachment and Section 48 gives liberty to the State Government to withdraw from the acquisition at any stage before possession is taken. The ratio laid down in this case also indicates that once possession is taken, power under section 48(1) of the Act to withdraw from the acquisition of the land concerned cannot be exercised by the State Government. In Menka Co-operative Housing Society Limited and another (supra), the Division Bench of this Court has examined nature and scope of Sections 16,17 and 48 of the Act and held that unless and until there is absolute and statutory vesting of the land in the Government, the Government is free to withdraw from the acquisition. This means that once the land has vested absolutely in the Government free from all encumbrances and possession has been taken, the Government is not free to withdraw from the acquisition of the land concerned. The power of the Government to withdraw from the acquisition in view of section 48 of the Act again came to be examined by the Apex Court in Awadh Bihari Yadav and others (Supra). Therein, possession of the land concerned was taken by the Government under section 17(1) of the Act, but no award was made within the period prescribed by section 11A of the Act. It was contended before the Supreme Court that as award was not made within the period prescribed by section 11A of the Act, provision as to lapsing of acquisition proceedings was applicable and Government was free to withdraw from acquisition in view of section 48 of the Act. While negativing the said contention, the Supreme Court has held that even if no award is made within the period prescribed by section 11A of the Act, proceedings would not lapse and Government cannot withdraw from acquisition once possession of the land has been taken. In Mohan Sing and others (Supra), the Supreme Court has in para-30 of the reported judgment held as under :-

"It is true that after the possession of the land is taken either under Section 17(1), 17(2) or 16, the land stands vested in the State absolutely free from all encumbrances. Subsequently, the power of withdrawal under Section 48(1) would no

more be available. The ratio in Avinash Sharma case relied on by Shri Sindhu has no application to the facts of this case. Therein, the facts were that after the possession was taken under Section 17(1) and vested in the State, exercising the power under section 21 of the General Clauses Act, the declaration under Section 6(1) was withdrawn by the Government. The question was whether the Government had that power ? In that context, this Court had held that after the land vested in the State free from all encumbrances under Section 17(1), the power of issuing of a notification and the power to withdraw such notification envisaged under Section 21 of the General Clauses Act was not applicable, since the land already stood vested and the Government was denuded of its power under the Act."

10. From the authoritative pronouncement of law on the point by the Supreme Court, there is no manner of doubt that once possession has been taken, the State Government is precluded from withdrawing the acquisition of the land concerned. Therefore, we are of the view that the decision of the State Government to withdraw from the acquisition of survey no.1038, admeasuring 384 sq.mts. is contrary to the provisions of section 48 of the Act and, therefore, the impugned orders as well as communication are liable to be set aside and quashed.

11. The submission that in the year 1992, the petitioner- Municipality itself had proposed to the State Government to withdraw from the acquisition of survey no.1038 and, therefore, the petition should be dismissed, has no substance. It is true that a proposal was made by the petitioner- Municipality on July 20, 1992 to the State Government to withdraw from the acquisition. However, the record does not indicate that any steps at all were taken by the State Government under section 48 for withdrawing from acquisition of survey no.1038. The record on the contrary establishes that the Government had taken possession of the land on January 2, 1997 and had thereafter handed over possession of land to the petitioner-Municipality. The State Government decided to withdraw from the acquisition of the land concerned only after it was directed to consider the representation made by respondent no.9 in Special Civil Application no. 164/97. However, as noted earlier, before that, possession of the land was already taken by the competent authority and handed over to the petitioner-Municipality. Therefore, prayer made in the petition cannot be denied

on the ground that the petitioner-Municipality itself had requested in past to the State Government to withdraw from the acquisition of this land. Similarly, the petition cannot be dismissed because the State Government is ready and willing to make available another piece of land to the petitioner-Municipality for setting up pumping station. The learned Counsel for the petitioner has pointed out that the acquisition proceedings were initiated in the year 1979 and by this time the petitioner-Municipality has incurred heavy expenditure for laying underground drainage lines on the basis that the pumping station would be installed on survey no.1038 situated at Gungadi Pati, Patan. Even if this plea advanced by the learned Counsel for the petitioner is not taken into consideration for want of sufficient material, there is no manner of doubt that possession having been taken by the acquiring body, it is not open to the State Government to exercise powers under section 48 of the Act and decide to withdraw from acquisition of survey no.1038.

12. Having regard to the totality of the facts and circumstances of the case, we are of the opinion that action of the State Government to withdraw from acquisition proceedings, is without authority of law and deserves to be set aside by the Court.

For the foregoing reasons, the petition succeeds. Orders dated June 9, 1997, August 29, 1997 as well as communication dated December 19, 1997 produced collectively at Annexure-L to the petition, are hereby set aside and quashed. As the action of the State Government to withdraw from the acquisition of survey no.1038 situated at Gungadi Pati, Patan City is set aside, Deputy Executive Engineer, Gujarat Water Supply & Sewerage Board would be free to proceed further with the construction of the Pumping Station. Rule is made absolute, with no order as to costs.

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